Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-320

COAST OF MAINE LOBSTER CO., INC.
ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners, by and through their attorneys, Richard E. Valentino and George F. Wood, pray that a Writ of Certiorari issue to review the judgment heretofore entered against them by the United States Court of Appeals for the First Circuit.

1. OPINIONS BELOW

On or about October 3, 1975 the Petitioners were found guilty in the U. S. District Court for the Southern District of Maine by a jury on 29 Counts of a 42 Count Indictment charging violation of Title 18, United States Code, §§1341 and 1343. A timely Notice of Appeal was filed as to both Petitioners on or about October 3, 1975. By its Opinion dated May 10, 1976 the United States Court of Appeals for the First Circuit vacated the Judgment of the District Court, set aside the verdict, and ordered a new trial. By its Opinion dated June 25, 1976 the United States Court of Appeals for the First Circuit denied the Government's petition for a new hearing.

Without being reindicted the Petitioners were re-tried in the United States District Court for the Southern District of Maine and on or about September 29, 1976 a jury verdict was returned and filed finding the Petitioners guilty of 29 Counts of violating Title 18 United States Code, §§1341 and 1343. Notice of Appeal was timely filed as to both Petitioners on September 30, 1976. By an Opinion dated June 30, 1977, the United States Court of Appeals for the First Circuit affirmed the conviction of the Petitioners, said Opinion being set forth in Appendix A.

2. JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the First Circuit were entered on June 30, 1977.

By application dated July 22, 1977, the Petitioners sought an Extension of Time within which to file a Petition for a Writ of Certiorari. On July 27, 1977 Mr. Justice Brennan signed an Order Extending the Time to File the said Petition until and including August 29, 1977. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, §1254(1).

3. QUESTION PRESENTED

Under the current posture of the Fifth Amendment does making substantial deletions from a criminal indictment by the Trial Court represent an unconstitutional "amendment" of that indictment in the absence of its resubmission to the Grand Jury.

4. CONSTITUTIONAL PROVISIONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. STATEMENT OF THE CASE

Both Defendants, Jonathan M. Singer and Coast of Maine Lobster Co., Inc., were indicted by the United States District Court for the Southern District of Maine on April 22, 1975 on 42 separate Counts of mail and wire fraud, 18 United States Code, §§1341 and 1343. After having been convicted on some 29 Counts of a 42 Count Indictment, the Petitioners prosecuted a successful appeal to the United States Court of Appeals for the First Circuit which ordered the Judgment be vacated and a new trial.

The Defendants were not reindicted. The original 42 Count Indictment was merely amended by the Trial Court by placing masking tape over the counts having been previously dismissed or upon which the Defendants had been previously acquitted by the jury. Thereafter, the Defendants were tried before a jury and convicted on the remaining 29 Counts of mail and wire fraud.

More specifically, prior to the new trial ordered by the United States First Circuit Court of Appeals, the United States District Court for the Southern District of Maine masked the charging paragraph of Count I of the Indictment. Also Counts numbered X, XXVI, XXVII, XXVIII, XXX, XXXI, XXXIII, XXXIV, XXXV, XXXVI, XXXVIII, and XL of the original Indictment had all been covered by masking tape by the Trial Court for presentment to the jury at the second trial.

As counsel for the Petitioners realized upon having seen for the first time

how the amended version of the original indictment would appear to the jury, the masked and patched version of the indictment was going to imply to the jury that some judicial action had preceded the trial and would permit the inference that the Defendants had done something bad enough to warrant additional judicial action against them.

For example, paragraph 1 of each of the remaining counts in the amended indictment referred to a paragraph 16 of the original Count I, which paragraph had obviously been deleted from the indictment. Upon reading the indictment with which they were provided, it was inevitable that the jury would engage in speculation and conjecture as to why the original indictment had been changed.

Counsel for the Petitioners specifically objected to the indictment and requested that the Petitioners be reindicted (Record, page 7b). The Trial Court denied this request and offered to instruct the jury not to speculate as to why 13 Counts of a 42 Count Indictment were missing.

The Court's explanation of the amended form of the indictment is instructive not only of the prejudice created with the jury by the amended indictment but also of the magnitude of the deletions made from the original indictment.

> "As I also believe I explained to you at the start of the trial, the Indictment originally in this case, contained 42 Counts as they are called or separate charges. The Government has offered no proof

with respect to thirteen of these counts, and those Counts, those thirteen Counts, were withdrawn before the trial started.

These thirteen Counts are therefore not before you. They should not be discussed or considered by you and the fact they were originally in the Indictment and are not before you now should have no bearing one way or the other in your consideration, of the remaining 29 Counts of the Indictment, and for your convenience, with the agreement of the parties, we have prepared a copy of the Indictment for your use from which the thirteen Counts which are no longer before you have been withdrawn.

What we actually have done is to mask the Counts which are not before you and you will understand that these Counts -- don't try to read under the masking. I don't think you can, but they are not before you in any way." (Record, Page 927 and 928).

After the Court's instruction, counsel for the Petitioners renewed their objection to that part of the Court's instruction referring to the thirteen counts of the Indictment on the ground that it would permit the jury to infer that the Petitioners had been previously tried. (Record, Page 953). Instead of the actual masked indictment, a photocopy of the amended version of the original indictment was the presented to the jury for their use

during their deliberations. Defense counsel relented that it was "too late now" to repair the damage already created in the minds of the jury from the amended indictment, but indicated that it would prefer a photocopy of the indictment to the original indictment covered with masking tape. (Record, Page 954).

In response to the Petitioners' objection with regard to the form of the indictment, the Trial Court acknowledged that it was obvious that there was something missing from the indictment (Record, Page 954), but dismissed the objection of the Petitioners characterizing their counsels' concern as "unnecessary." The Court again brought the fact of the substantial deletions from the indictment to the attention of the jury and gave them a photocopy of an indictment containing spaces where there were once additional counts:

"Ladies and Gentlemen, as I indicated, the Counts which are no longer before you which have been withdrawn on the copy of the Indictment I had were masked. We are going to have the Clerk photostat this so that even the masking won't be present. There will be blanks where those Counts were. As I explained to you, you are to disregard entirely those Counts. You are to disregard entirely the fact that the original indictment did contain thirteen Counts more which are no longer before you." (Record, Page 955).

It is also important to note that despite the Trial Court's belittling of the prejudicial effect of the substantial deletions made in the original indictment, the Trial Court upon its own suggestion dismissed one member of the jury panel who had learned inadvertently through pretrial publicity that Jonathan Singer and Coast of Maine Lobster Company had been tried before. (Record, Pages 30, 35, and 36).

After the amended Indictment was presented to the jury in the form of a photocopy, the Defendants were convicted on all twenty-nine counts of the amended indictment.

6. REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted to Resolve a Conflict Among the Circuits

The Petitioners maintain that they were denied their 5th Amendment Right to be tried upon an indictment by a Grand Jury when prior to the second trial, the Court permitted wholesale deletions from the original indictment without resubmitting it to the Grand Jury. The Petitioners additionally maintain that they were prejudiced by the unconstitutional amendment of the indictment because the form of the amendment permitted the jury to speculate that the Petitioners had been previously tried.

The principle that a general indictment cannot be amended by a Federal Court or prosecutor except by resubmission to the Grand Jury was most prominently articulated by the United States Supreme Court in Ex parte Bain, 121 U.S. 1, 30 L.Ed. 849, 7 S.Ct. 781; from which the Supreme Court quoted extensively in Russell vs United States, 369 U.S. 749, 8 L.Ed. 2d 240, 255, 82 S.Ct. 1038 (1962):

> "This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. Ex parte Bain, 121 US 1,30. L.Ed. 849, 7 S.Ct. 781; United States vs. Norris, 281 US 619, 74 L.Ed. 1076, 50 S.Ct. 424; Stirone v United States, 361 US 212, 4 L.Ed. 2d 252, 80 S.Ct. 270. 'If it lies within the province of a court to change the charging part of an indictment to suit its

own notions of what it ought to have been, or what the grand jury would probably have made if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. . .Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' Ex parte Bain, supra, (121 US at 10, 13). We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by the grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' Stirone vs. United States, supra, (361 U.S. at 218)." Id. L. Ed. 2d at 255.

The United States Court of Appeals For the First Circuit on Pages 8 and 9 of its Opinion, found at the Appendix A of this Petition, was quick to allude to the often cited but much confused exceptions to this general rule which permit, among other

things, the withdrawal of parts of an indictment by the court from the jury's consideration as opposed to making judicial additions to the indictment. United States vs. Dawson, 516 F 2d 796, 801 (9th Cir.) cert. denied, 423 U.S. 855, 965, Ct 104, 46 L. Ed. 2d 80 (1975).

The United States Court of Appeals for the 9th Circuit clearly articulated that "the law in this circuit" (United States vs. Dawson, at 802) was that the general rule enunciated in Ex parte Bain, supra, did not preclude a Court's making deletions in an indictment.

> "In additon to the rule permitting amendment on matters of form, another ameliorating doctrine is the rule that a portion of an indictment that the evidence does not support may be withdrawn from the jury, and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense. (C. Wright, 1 Federal Practice and Procedure 274-75, 1969)." United States vs. Dawson, supra, at 801.

In footnotes number 3 and 4 of the 9th Circuit Opinion in United States vs. Dawson, that Circuit supported its interpretation of the Ex parte Bain decision with decisions from the 1st, 3rd, 5th, 6th, 7th, 8th, 9th, and 10th Circuits, all of which supposedly stand for the proposition that mere deletions from an indictment cannot be characterized as an amendment of substance which the Constitution prohibits without its resubmission to the Grand Jury.

Of the more instructive circuit court opinions adhering to this exception to Ex parte Bain is the 10th Circuit decision in United States vs. Hall, 356 F. 2d 313 (10th Cir. 1976). The 10th Circuit Court in United States vs. Hall, emphasized that the Supreme Court in Ex parte Bain, supra, and Stirone vs. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed. 2d 252 (1960), had not specifically ruled that a trial court was unable to withdraw charges from an indictment. This apparently justified that circuit's conclusion that changes in an indictment accomplished by deletion as opposed to additon do not require the resubmission of that indictment to the Grand Jury. Several decisions out of the 5th Circuit have also characterized the 1st Circuit's position on this issue as a well-defined exception to the Ex parte Bain decision which permits deletions from an indictment without its resubmission to the Grand Jury.

> "It is clear that an indictment may not be amended except by resubmission to the grand jury. Russell vs. United States, 369 U.S. 749, S.CT. 781, 30 L.Ed. 849 (1887). But the Supreme Court has held that withdrawing a part of a charge from the consideration of the jury does not work an amendment of the indictment, Salinger vs. United States, 272 U.S. 542, 548-549, 47 S.Ct. 173, 71, L.Ed. 398 (1962), provided nothing is thereby added to the indictment, See United States v. Ballard, 322 U.S. 78, 88, 90-91, 64 S.Ct. 882 88 L.Ed. 1148 (1944) (Stone, C. J. dissenting). The 'severance' which occurred in this case was not an amendment which added any charges to the

> indictment and was therefore proper." Overstreet v. United States, 321 F 2d 459, 461 (5th Cir. 1963).
>
> "But the Supreme Court has held that withdrawing a part of a charge from the consideration of the jury does not work an amendment of the indictment, Salinger v. United States, 272 U.S. 542, 548-549, 47 S.Ct. 173, 71 L.Ed 398 (1962), provided nothing is thereby added to the indictment. See United States v. Norris, 281 U.S. 619, 623 50 S.Ct.424,74 L.Ed 1076 (1930); United States v. Ballard, 332 U.S. 78, 88, 90-91, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) (Stone, C.J. dissenting). . . On a fortiori grounds therefore, we refuse to hold that the striking of portions of the indictment here constituted an encroachment upon the principles announced in Ex parte Bain (supra)." Thomas v. United States, 398 F 2d 531, 538 (5th Cir., 1957). See also United States v. Pryor, 546 F 2d 1254, 1257 (5th Cir. 1977).

Despite the unequivocal language and air of finality utilized by the majority of United States Circuit Courts addressing the issue, there continues to be a conflict among the circuits with respect to whether or not making substantial deletions from an original indictment violates a Defendant's 5th Amendment Rights in the absence of the resubmission of that indictment to the Grand Jury.

> "Ever since the Supreme Court announced in Ex parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), that an indictment cannot be amended except by resubmission to a grand jury, the law has been in a 'confused state,' United States v. Edwards, 465 F2d 943,

950 (9th Cir. 1972) as to whether any alteration is permissible and if so, how any appropriate changes may be properly be made." United States vs. Cirami, 510 F2d 69, 72 (2d Cir. 1975).

The United States Court of Appeals for the 9th Circuit, although it did not feel that it had the case to set the law straight, recognized the conflict among the circuits on this issue.

"In short, we think that the progeny of Bain are out of joint. We do not, however, think that the present case was born to set them right." Heisler vs. United States, 394 F2d 695, 699 (9th Cir. 1968).

The United States Court of Appeals for the 2nd and 6th Circuits have appeared to adopt the minority position that substantial deletions by a trial court from an indictment issued by a Grand Jury can deprive that Defendant of his 5th Amendment Right to be tried upon an indictment issued by a Grand Jury. The United States of Appeals for the 6th Circuit stated in United States vs. Maselli, 534 F2d 1197, 1202 (6th Cir. 1976):

"Though it is not entirely clear from the record, it appears the court did prepare a copy of the indictment with counts 1-8 deleted and furnished it to counsel in the case with an indication that this truncated document would be given to the jury. Furthermore, it appears that the jury was given a copy of the indictment which contained the first eight counts, but from which other deletions had been made. . .An indictment returned by a federal grand

jury may be amended only upon resubmission to the grand jury except as to merely formal changes. Russell vs. United States, supra, 369 U.S. at 770, 82 S.Ct. at 1050, 8 L.Ed. 2d at 254; United States vs. Pandilidis, 534 F2d 644 (6th Cir. 1976). Thus, an indictment should be neither changed nor reduced by the Court. However, since the only changes actually made in the copy of the indictment which was apparently furnished to the jury in this case were made on the motion of one of the Defendants, or with the acquiescence of all parties, there was no prejudice." Id. at 1202.

The 2nd Circuit for the United States Court of Appeals is apparently the only other circuit standing directly in conflict with the majority of the circuits which adhere to the view that even a substantial deletion from an indictment does not require a resubmission to the Grand Jury under the provisions of the 5th Amendment. In United States vs.Cirami, 510 F2d 69 (2d Cir. 1975), the Defendant was charged by a 19 count indictment covering three sets of violations of social security and unemployment tax evasion. The Government made errors in drafting the first 17 counts of that indictment by alleging that taxes were due from individual appellants as opposed to an employer corporation. The deletion of the incorrect wording in 17 counts of that indictment upon the motion of the Government was challenged as a denial of the 5th Amendment Right to trial upon indictment. Although the court held that the deletion caused no prejudice because "(t)he disregarded portions of the indictment in this case were plainly

surplusage. . ." (Id. at 73), that court did hold that mere deletions of even unnecessary language in an indictment may constitute an amendment impermissible under the Constitution without resubmission of the indictment to the Grand Jury.

> "This Court has viewed Bain as holding that some deletions of unnecessary language may work an impermissible 'fundamental change' in the charge set forth in an indictment, even though a legally sufficient allegation remains. See United States v. Colasurdo, supra, 453 F2d at 590. That type of change, involvong the disregard of language that might well have had a significant bearing on the grand jury's decision to indict, may still violate the Bain rule." Id. at 72.

After stating that substantial deletions from an indictment can represent an unconstitutional amendment of that indictment, the 2nd Circuit in United States vs. Cirami, supra, and again in United States vs. Wilner, 523 F2d, 68 (2d Cir. 1975), also expressed disapproval of the trial Court's method of making deletions.

> "We do not approve of the procedure followed by the District Court in physically deleting the allegations relating to the August 1971 overt acts. We are informed that this was accomplished by making a photostatic copy of the indictment with the deleted portions covered over. As we pointed out in United States v. Cirami, supra, 'the preferable course is to prepare a retyped "clean" version of the indictment, omitting the language to

> be disregarded without any indication of its omission.' However, since Judge Laker had already advised the jury that he was physically deleting a portion of the indictment, and only 23 words were actually deleted, we see no prejudicial error." United States v. Wilner, supra, at 72.

> "In the instant case, we are neither asked to decide, nor do we express, any view as to whether the jury is to inspect an indictment in any or all criminal prosecutions. But, if a jury is permitted to see the indictment, and if any language of that indictment is surplusage or other matter that a jury may properly be instructed to disregard, we think the preferable course is to prepare a retyped 'clean' version of the indictment, omitting the language to be disregarded without any indication of its omission. If the language is not to be considered by the jury, it is surely better to remove it from their scrutiny, rather than rely on instructions. Crossing out or covering the deleted words only serves to arouse the jury's curiosity and stimulate unwarranted specualtion as to the full scope of the original allegations." United States vs. Cirami, supra at 74.

In both of these cases the United States Court of Appeals for the 2nd Circuit concluded that the fact of deletion and the means by which it was accomplished did not prejudice the Defendant. That conclusion cannot safely be reached in the present case. The Trial Court acknowledged that it would be obvious to the jury that something was missing from the first masked and then

photocopied indictment. (Record, Page 954). The Trial Court nevertheless dismissed the Petitioner' concern over the indictment as "unnecessary."

Despite the Trial Court's apparent belittling of the prejudice created against the Petitioners by the masked indictment, the Court repeatedly drew the attention of the jury to the deletions by its cautionary remarks instructing the jury to ignore what the Court had made even more obvious. (Record, Pages 927, 928, and 955). The Court's repeated references to the deletions along with the indictment's obviously patched condition certainly served "to arouse the jury's curiousity and stimulate unwarranted specualtion as to the full scope of the allegations." United States vs. Cirami, supra, at 74.

By dismissing a juror who had admitted to some vague knowledge of a previous trial of the Petitioners (Record, Pages 30, 35, and 36), the Trial Court acknowledged implicitly that the Petitioners could be prejudiced in an atmosphere of juror speculation about previous judicial action. This atmosphere was in fact created in the second trial of the Petitioners through the use of a masked, patched, amended, photocopied, and much discussed version of the original indictment.

CONCLUSION

There is a conflict among the United States Circuit Courts of Appeal as to whether under the current posture of the 5th Amendment making substantial deletions from a criminal indictment represents an unconstitutional amendment of that indictment in the absence of its resubmission to the Grand

Jury. Your Petitioners maintain that under the circumstances of the case at bar, the deletions made by the Court from the indictment violated their 5th Amendment rights. The Petitioners were prejudiced by this unconstitutional amendment because they were thereafter tried in an atmosphere of speculation regarding previous judicial action made obvious by the amended indictment and by the Trial Court's repeated references to the deletions.

WHEREFORE, pursuant to the foregoing, the Petitioners pray that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the 1st Circuit and pursuant thereto that the said convictions be reversed.

Respectfully submitted,

George F. Wood

Richard E. Valentino

CERTIFICATE OF SERVICE

We, George F. Wood, Esq. and Richard E. Valentino, Esq., attorneys for the Petitioners in the above matter, hereby certify that we have this day caused notice of the foregoing Petition for a Writ of Certiorari to be served by depositing in the U.S. Mail, airmail postage prepaid, three conformed copies of said Petition addressed as follows:

Robert H. Bork
Solicitor General
Department of Justice
Washington, D.C. 20530

Richard E. Valentino
Attorney for Petitioners
99 Ferry Road
Saco, Maine 04072

George F. Wood, Esq.
Attorney for Petitioners
199 Main Street
Saco, Maine 04072

Dated at Saco, Maine, this 26th Day of August, 1977.

United States Court of Appeals for the First Circuit

No. 76-1498

UNITED STATES OF AMERICA,

APPELLEE,

v.

COAST OF MAINE LOBSTER CO., INC.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MAINE
[HON. EDWARD T. GIGNOUX, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*, and
MARKEY,* *Judge*.

Richard A. Valentino, with whom *George F. Wood* and *Smith, Elliott, Wood & Nelson* were on brief, for appellants.
John B. Wlodkowski, Assistant United States Attorney, with whom *Peter Mills*, United States Attorney, was on brief, for appellee.

June 30, 1977

MARKEY, *Judge*. Appellants, Jonathan M. Singer and Coast of Maine Lobster Co., Inc. (CMLC), were convicted of twenty-nine counts of mail and wire fraud in violation

* Of The Court of Customs and Patent Appeals, sitting by designation.

of 18 U.S.C. §§ 1341[1] and 1343[2] following a six-day jury trial.[3] Singer was sentenced to a one year term of imprisonment under each count, the terms to be served concurrently. CMLC was fined $1,000 under each count, but the fine was remitted in view of CLMC's inability to pay.

ISSUES

The issues presented on appeal are whether the trial court erred in (1) admitting into evidence a stipulation that appellants had not filed for bankruptcy; (2) denying appellants' motion for a mistrial based on the prosecutor's interruption of defense summation and on the related jury instruction; (3) refusing a requested instruction on the legal theory of the defense; (4) presenting to the jury an altered form of indictment without resubmission to the grand jury; (5) engaging in a colloquy with the jury which coerced or unduly hastened its verdict; and (6) accepting

[1] Section 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[2] Section 1343 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] A prior judgment against these appellants on the same charges was reversed by this court because of publicity given during the earlier trial to prosecutorial statements needlessly impugning the integrity of that trial. *United States v. Coast of Maine Lobster Co.*, 538 F.2d 899 (1st Cir. 1976).

a verdict not supported by the evidence. Finding no basis for any of appellants' assignments of error, we affirm.

BACKGROUND

CMLC was incorporated on April 21, 1972, the articles of incorporation listing Singer as incorporator, clerk, director, and sole stockholder.

During the first weeks of June 1972, appellants conducted an extensive promotional campaign, through advertisements in prominent newspapers, primarily in southern and western portions of the United States, and through brochures mailed to individuals, offering guaranteed delivery of live Maine lobsters and clams at "irresistible prices" which included the cost of air freight. The offer was limited to the month of July 1972; orders and checks had to be received by June 18, 1972, to guarantee July delivery.

Eleven prosecution witnesses testified that they had responded to appellants' offer and mailed an order form accompanied by a check or money order for the purchase price to CMLC,[4] paying amounts varying between $39.95 and $64.45. Instead of lobsters, however, all received a lulling letter or telephone call informing them that their order could not be filled as requested, but the goods could be reordered for delivery at a later date, or the purchase price could be refunded.[5]

Inability of CMLC to deliver was blamed on an attachment of its bank account and on a theft of its operating capital. Mrs. Ichie Dozier testified that she received a telephone call from CMLC during which she was told that, as a result of the attachment and theft, the corporation would be going into bankruptcy.

[4] Eleven counts of the indictment relate to the delivery of these checks by the Postal Service to CMLC.

[5] Thirteen counts of the indictment relate to the letters or telephone calls. The remaining five counts involve the sending of order confirmations by CMLC.

Singer's bank accounts, personal and corporate, were attached on June 27, 1972, during a civil action for damages brought by Salt Water Farms, Inc. (SWF), York Harbor, Maine. SWF, also in the mail-order lobster business, based its suit on appellants' possession of several thousand pre-addressed labels bearing names of prospective customers and a computer printout listing 40,000 customers' names and addresses, the labels and listing having been reported stolen from SWF in September 1971. The labels and customer list were used in carrying out appellants' promotional campaign.

On the morning of July 1, 1972, the approximate date of the first air delivery of lobsters, Singer reported to the Portland, Maine Police Department that his office safe had been peeled open, and that $23,000 in customers' money had been stolen therefrom. However, Philip McDonough, an evidence technician whose qualifications as an expert in the field were stipulated at trial, testified that he investigated Singer's complaint and that the undisturbed coating of dust on all inside surfaces of the safe evidenced the absence of money or corporate papers in the safe at the time it was peeled open.

Regina Schueler, who worked as a secretary-office clerk for appellants from the end of May 1970 to June 30, 1972, testified that during her employment the office safe was never used and its door was always open. She testified further that her services were terminated at the end of June by Singer because "he hadn't done as well as he had expected to do," notwithstanding that daily orders were averaging $1,000.

Subpoenaed records of the corporation reflected 572 orders received by CMLC. Shippers' receipts documented that lobsters had been sent to 37 individuals. None of the eleven prosecution witnesses received either lobsters or a refund. Four of the eleven had mailed checks to CMLC

on or after June 30, 1972, the day prior to the alleged theft. Singer admitted that the monies of these four witnesses could not have been included in the amount allegedly stolen from the safe on July 1, 1972.

(1) *The Stipulation That Appellants Had Not Filed For Bankruptcy*

Under the general rule, relevancy of evidence is within the sound discretion of the trial judge, whose ruling will not be disturbed unless an abuse is shown. *United States v. Carter*, 173 U.S. App. D.C. 54, 522 F.2d 666 (1975). One element of the violation charged in the present indictment was that appellants "devised . . . [a] scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent . . . representations." The stipulation that neither appellant had filed for bankruptcy was clearly relevant, and thus admissible, in light of Mrs. Dozier's testimony that CMLC had told her it was going into bankruptcy. We find no abuse of discretion in admitting the stipulation.

(2) *Interruption of Defense Summation*

During a one-and-a-half hour defense summation, the prosecutor twice objected to counsel's "putting himself as a witness." The rule that counsel must refrain from interjecting personal beliefs into the presentation of his case, *United States v. Cotter*, 425 F.2d 450 (1st Cir. 1970), applies equally to defense counsel and prosecutors, and the prosecutor acted within his rights in raising these objections.

The prosecutor also objected to this statement to the jury by appellants' counsel:

> Now, the computer printout list has been right in here in this case so much, has the Defendant ever been

> charged with the crime for doing that? I haven't heard any evidence to that effect. None. None. And you can bet your life if he had, it would be before you.

The basis for objection was that the statement permitted a false jury inference that the government could have brought charges for other crimes but had not done so.

In response to the objection, the trial judge gave the following instruction:

> Well, Ladies and Gentlemen, I must instruct you that certain crimes are within the jurisdiction of the State Courts, certain crimes are within the jurisdiction of the Federal Court. A burglary of the type with which we are here concerned would be a matter which, if a criminal charge would be filed, would be within the jurisdiction of the State Courts in Maine and not the Federal Court.

Appellants' argument that the objection and instruction disparaged or interfered with appellants' defense are unpersuasive. Counsel resumed his summation along the same line pursued prior to the objection, and, as will appear below, appellants' theory of defense was clearly communicated to the jury in the court's general charge. The trial court has broad discretion in controlling the scope of closing argument, *United States v. Sawyer*, 143 U.S. App. D.C. 297, 443 F.2d 712 (1971), and the trial judge's clarifying instruction was well within his discretionary powers.

(3) *Refusal to Instruct*

Upon completion of the charge to the jury, the court refused appellants' requested instruction that "a scheme to defraud is not necessarily to be inferred from business adversity or unprofitable ventures."

Appellants contend that their theory of defense focused on exercise of poor business judgment, as opposed to a specific intent to defraud, and that the court's failure to give the requested instruction effectively precluded appellants from presenting their theory of defense to the jury. We disagree.

As this court pointed out in *New England Enterprises, Inc. v. United States*, 400 F.2d 58 (1st Cir. 1968), *cert. denied*, 393 U.S. 1036, 89 S. Ct. 654, 21 L.Ed. 2d 581 (1969), a failure to instruct in the precise words sought by counsel is not determinative. The relevant inquiry is whether the instruction as given communicates to the jury the substance of the request.

In the present case, the court's relevant instruction was:

> If you are satisfied from the evidence beyond a reasonable doubt that as the Government contends Mr. Singer devised a scheme to defraud persons who could be induced by his promotional campaign to order lobsters from him and to make payment before delivery and that he made use of the mails or interstate telephone communications in execution of that scheme, you should find the defendant guilty. But if, on the other hand, you are not so satisfied or, it goes without saying, you believe the testimony of Mr. Singer that he acted in good faith and was prevented from fulfilling his commitments by the attachment of his bank accounts and burglary of his office, then you should find the defendants not guilty.

The last sentence of the foregoing charge is clearly tantamount to that requested by appellants. Though expressed in terms of "good faith" rather than "business adversity," the particular events on which appellants based their defense, i.e., the attachment and burglary, were specifically

mentioned. The requested reference to "unprofitable ventures" would have been inconsistent with the contention of appellants that a modest profit would have been generated had the attachment and burglary not occurred. The trial court's refusal to give the requested instruction did not in any manner prejudice appellants' defense.

(4) *The Indictment*

As an aid in its deliberations, the jury was presented with a photocopy of the original indictment. The counts which had been dismissed, and upon which appellants had been acquitted in the first trial, were masked with tape prior to photocopying. The charging portion (para. sixteen) of Count I of the original indictment was also masked.[6] The masking did not alter the incorporation by reference of the other fifteen paragraphs of Count I into each of the twenty-nine counts remaining in the indictment, which appeared just as they had in the original indictment.

Appellants maintain that the changes in the indictment contravened the rule, enunciated by the Supreme Court almost a century ago in *Ex parte Bain*, 121 U.S. 1, 7 S. Ct. 781, 30 L.Ed. 849 (1887), that a federal indictment cannot be amended except by resubmission to a grand jury. We see no merit in this argument.

As was noted in *United States v. Dawson*, 516 F.2d 796, 801 (9th Cir.), *cert. denied*, 423 U.S. 855, 96 S. Ct. 104, 46 L.Ed. 2d 80 (1975):

> Although the language and rationale of *Bain* are exceptionally broad, in the considerable time that has passed since *Bain* was decided the courts have engrafted several exceptions and limitations on this "no amendment rule". . . .

[6] Appellants noted a timely objection to the changes in the indictment by pretrial motion in accordance with Fed. Rules Cr. Proc. Rule 12(b)(2), 28 U.S.C.

One such exception relates to matters of form. *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962).[7]

Moreover, as pointed out in C. Wright, 1 *Federal Practice and Procedure* 274-75 (1969):

> In addition to the rule permitting amendment on matters of form, another ameliorating doctrine is the rule that a portion of an indictment that the evidence does not support may be withdrawn from the jury, and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense.[8]

Cited in support of the above rule is *Salinger v. United States*, 272 U.S. 542, 47 S. Ct. 173, 71 L. Ed. 398 (1926), wherein the Supreme Court held that withdrawal from the jury of parts of an indictment unsupported by the evidence was not an amendment of the indictment and "was not even remotely an infraction of the constitutional provision that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.'" *Id.* at 549, 47 S. Ct. at 175, 71 L. Ed. at 402. Thus, *Salinger* clearly authorizes the withdrawal of parts of an indictment from consideration by the jury where, as here, no evidence has been presented with respect thereto, and appellants were not prejudiced by the deletion made here.

Appellants further argue that the manner in which the deletions were made "would permit the jury to infer that

[7] The Supreme Court in *Russell* made reference to "the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form." 369 U.S. at 770, 82 S. Ct. at 1050, 8 L. Ed. 2d at 255.

By way of dicta, the 2nd Circuit disparaged masking and photocopying in *United States v. Wilner*, 523 F.2d 68 (2nd Cir. 1975).

[8] Appellants have not alleged that anything was added to the indictment, or that the remaining allegations failed to charge an offense.

the Defendants had been tried previously." We disagree. Any possibility of the feared inference was effectively nullified by the following instructions of the trial judge:

> [T]he Indictment originally in this case, contained 42 Counts as they are called or separate charges. The Government has offered no proof with respect to thirteen of these counts, and those Counts, those thirteen Counts, were withdrawn before the trial started.
> These thirteen Counts are therefore not before you. They should not be discussed or considered by you and the fact they were originally in the Indictment and are not before you now should have no bearing one way or the other in your consideration, of the remaining 29 Counts of the Indictment, and for your convenience, with the agreement of the parties, we have prepared a copy of the Indictment for your use from which the thirteen Counts which are no longer before you have been withdrawn.

Nor are we persuaded that the masking of the charging portion of Count I, upon which appellants were acquitted in the previous trial, vitiated the incorporation by reference of the remainder of Count I into the other twenty-nine counts. *United States v. Shavin*, 287 F.2d 647, 650 (7th Cir. 1961).

We thus find no reversible error in the trial court's handling of the indictment.

(5) *Alleged Coercion of the Jury*

The jury retired to commence its deliberations at 3:07 P.M. on Tuesday, September 28, 1976. At 11:15 P.M., the trial judge summoned counsel and told them that at 10:00 P.M. the jury foreman had been asked whether the jury might reach a verdict at a reasonable hour that evening,

that the foreman had responded that he expected a verdict within the hour, and that a second inquiry had been made at 11:00 P.M. to which the foreman responded that he did not expect a verdict in the "immediate future." Counsel were also informed that an effort to secure nearby lodgings for the jurors had been unsuccessful.

It was proposed by the trial judge to call the jury into the courtroom, and to inquire of the foreman whether the jury had been able to agree on a verdict with respect to either defendant on one or more counts. If so, the trial judge indicated that a partial verdict would be accepted; if not, the jury would be permitted to return home for the night after having been given the appropriate cautionary instructions.

Thereupon the jury was called in and the following colloquy ensued:

> THE COURT: The Court is going to inquire, first, of your Foreman, as to whether you, Mr. Foreman, feel that you can arrive at a verdict in this case within the next hour or so or whether you would prefer to go home and return tomorrow morning at, say, 10:00 o'clock, and resume your deliberations then?
>
> THE FOREMAN: Well, we have come upon agreement on certain points and at the present time it looks like we might be able to complete it in an hour.
>
> THE COURT: Would you prefer to attempt to do that? It is 11:30 in the evening. When I say "you," I speak through you to the entire Jury.
>
> THE FOREMAN: We would prefer to do it tonight, I guess, your Honor.
>
> THE COURT: Have you agreed upon your verdict as to any of the Counts?
>
> THE FOREMAN: Yes.

> THE COURT: You have? All right. Well, then, the Jury may retire and continue their deliberations and, Mr. Foreman, when you have reached the point where you feel you cannot conclude your deliberations this evening, would you send a note through the Jury Officer and we will be waiting.

The jury resumed its deliberations at approximately 11:30 P.M. and returned a verdict at 12:35 A.M., finding both defendants guilty on all counts charged in the indictment.

Though appellants entered no objection at the time, with respect to any coercive or hastening effect, they now claim that their defense was prejudiced by the quoted colloquy, arguing that the jury was being urged to reach a verdict within the hour or be prepared to drive a good portion of the night to their homes.

There is nothing in the present record to suggest disagreement among the jurors which was resolved in a rush to judgment. On the contrary, the jury foreman indicated at 10:00 P.M. that the jury was moving toward a verdict, and at 11:30 P.M., that the jury had agreed on certain points and that he thought it could arrive at a verdict within an hour. The trial judge gave no indication that a verdict must be reached,[9] much less that a verdict be reached within a specified time.[10] The jury could only have understood if it could not conclude its deliberations that night, it would return to resume the next day. Even then, the time for potential resumption was not fixed but was referred to as "say, 10:00 o'clock."

[9] *Cf. United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971) (expressed disapproval of instruction suggesting that "the case must at some time be decided." . There was no such suggestion here, and no suggestion, implicit or otherwise, as in *Flannery*, that it was "more important [for the jury] to be quick than to be thoughtful." *Id.* at 883.

[10] *Cf. Burroughs v. United States*, 365 F.2d 431 (10th Cir. 1966) (entreating jury to strive toward a verdict by a certain time held reversible error).

Appellants point to the speed with which the verdict was reached after the quoted colloquy, as compared with the prior period of deliberation, as indicative of a hastening effect. The foreman's statement, however, that the jury had already reached a verdict with respect to one or more of the counts, the seven prior hours of deliberations, and the basic similarity of the evidence on each count, all make it unsurprising that the verdict was reached when it was. The circumstances are fully compatible with a conjecture that the verdict would have been reached at about the same time if there had been no colloquy with the court.

Nothing of record supports appellants' speculation, implicit in appellants' argument, that jurors were motivated by self-interest in expediting their decisions. *Cf. United States v. Scallion*, 533 F.2d 909, 919-20 (5th Cir. 1976).[11] The totality of the circumstances here presented reflects an absence of coercion or hastening of the jury's verdict and the absence of reversible error in the court's colloquy.[12]

(6) *Evidentiary Support for Verdict*

In considering appellants' contention that the verdict was unsupported by the evidence, the determinative question is "whether a rational juror drawing reasonable inferences from the evidence viewed in the light most favorable to the government could have found guilt beyond a reasonable doubt." *United States v. Sheehy*, 541 F.2d 123, 126-27 (1st Cir. 1975).

[11] Evidence that some sort of compromise had been reached among the jurors to avoid returning the next day would not of itself have warranted a new trial. *United States v. Green*, 523 F.2d 229 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1074, 96 S. Ct. 858, 47 L. Ed. 2d 84 (1976).

[12] Other Circuits have found similar instruction noncoercive. See, *United States v. Peskin*, 527 F.2d 71, 84-85 (7th Cir. 1975), *cert. denied*, U.S. ,97 S. Ct. 63, 50 L.Ed. 2d 79 (1976); and *Glazerman v. United States*, 421 F.2d 547, 554 (10th Cir.), *cert. denied*, 398 U.S. 928, 90 S. Ct. 1817, 26 L. Ed. 2d 90 (1970).

The jury was fully entitled here to draw a rational inference that appellants misrepresented the attachment as preventing timely delivery of the lobsters. The attachment had little, if any, effect on appellants' ability to ship lobsters. Nor was the inference unwarranted that the burglary was merely a ruse employed in furtherance of an overall scheme to defraud.

The inferences permissible from the evidence severely undermine appellants' theory that the attachment and robbery were unfortunate and unforeseen setbacks encountered, in a good faith business undertaking, by one having little business acumen. Had the jury drawn these inferences, it could have reached no other conclusion than that appellants' good faith defense was unworthy of belief. The receipt of money subsequent to the robbery, followed by neither lobster delivery nor refund, could only have rendered disbelief the more inescapable.

CONCLUSION

Appellants' arguments fail to convince us of the presence of prejudicial error of any kind.

Affirmed.

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